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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

The Honorable William E. Kennard
Chairman, Federal Communications Commission
445 12th Street, S.W.
Washington DC 20554

**Re: Bell Atlantic-New York Long Distance Application,
CC Docket No. 99-295**

Dear Chairman Kennard:

This letter responds to the public notice dated December 10, 1999, and specifically to the proposal of Bell Atlantic-New York (BA-NY or Bell Atlantic) to adopt a separate affiliate for the provision of advanced services as a structural remedy to prevent future discrimination against DSL competitive local exchange carriers (LECs) in New York. This letter also updates the record with respect to recent progress of BA-NY to improve loop provisioning.

As you know, NorthPoint Communications, Inc. (NorthPoint) has consistently focused its attention in this proceeding on ensuring that New York consumers are able to enjoy the services of DSL competitors like NorthPoint on an open and non-discriminatory basis. As a general matter, NorthPoint favors increased competition in all markets, and in particular, with no embedded base of long distance customers, NorthPoint has no interest in barring Bell Atlantic from entering new inter-LATA markets per se. Rather, NorthPoint's attention to BA-NY's application and its participation in this proceeding are related solely to ensuring that BA-NY has done all that it must under the Act to permit NorthPoint to offer competitive DSL services in New York.

I. Introduction

As an initial matter, BA-NY should be credited with significant and ongoing efforts toward facilitating the delivery of services by NorthPoint on unbundled loops in New York. Specifically, BA-NY has approached loop provisioning challenges with real interest in eliminating them. This effort is genuine and more than a mere gesture to satisfy minimum regulatory expectations. Indeed, even in the last weeks BA-NY has put more than 400 new

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technicians on the street to provision loop orders, reached explicit agreement on precise measures of success and failure in provisioning, and proposed to meet or exceed absolute, *increasing* targets for provisioning success going forward from January 1.¹

Fortunately, the efforts of BA-NY and NorthPoint to improve loop provisioning performance show promise and have yielded a number of enhanced processes to track and fix provisioning errors for both parties. Unfortunately, these processes have yet to result in the level of improved performance to which both NorthPoint and BA-NY have committed themselves.²

It is in this context that BA-NY last week proposed to create a separate affiliate for the provision of advanced services.³ As you know, NorthPoint in the past has supported the requirement that incumbent local exchange carriers offer advanced services through a properly structured separate affiliate. NorthPoint commends BA-NY for volunteering to adopt this remedy and BA-NY deserves credit for proposing it.

While the Commission should embrace the proposal to adopt a separate affiliate, it is important to note that adoption of an affiliate is not a total solution to section 251 requirements or a guarantee that provisioning commitments will be met. Because a separate affiliate is designed to protect against (and can only benchmark against) unlawful discrimination, its usefulness is greatest in the case of DSL services in circumstances where the affiliate and DSL competitive LECs sell similar types of DSL products that require the same collocation arrangements and require access to the same unbundled network elements, and utilize the same Operations Support Systems. Where competitors differentiate in how they offer services, the separate affiliate's usefulness as a measure of parity is diminished. This is particularly true for NorthPoint, which offers an SDSL service on stand-alone loops,

¹ See Letter from Randal S. Milch to Lawrence G. Malone, December 10, 1999 at p. 2. In that letter, BA-NY committed to install working loops on the first scheduled install dates with guaranteed success rates of not less than 85%, 90% and 95% of all orders each month in the 1st, 2nd and 3rd quarters respectively. These absolute targets are superior to uncertain "parity" metrics. BA-NY has agreed that successful installs must meet or exceed targets based on total order volume less confirmed "no access" (where BA-NY and the CLEC agree that that access was denied, to preclude false "no access" claims), cancellations and, in some cases, facilities issues.

² See NorthPoint written ex parte submission, December 6, 1999. In November, BA-NY assured NorthPoint that new processes in place would result in successful installations of 80% of all loops set for installation in December, a commitment that will not be met.

³ See Letter from Thomas J. Tauke to Chairman William Kennard, December 10, 1999.

whereas the affiliate's ADSL product is offered exclusively on shared lines.⁴ Because the affiliate may not offer DSL on stand-alone loops, it may not provide a benchmark for the current provisioning commitments on those loops.

Consequently, though we are hopeful that the measures put in place by BA-NY and NorthPoint will succeed in improving substantially provisioning success, it is essential that the Commission take concrete steps to establish a safety net in the event that critical benchmarks are not achieved.⁵ To ensure that a safety net is present if BA-NY's obligations and commitments to improve performance are not achieved, this Commission must take seriously its statutory authority under section 271(d)(6). In this regard, the Commission should specifically advise in its order that a reported failure of BA-NY to meet its commitments will trigger the issuance of an Order to Show Cause why BA-NY's long-distance authority should not be suspended or revoked, and set an expedited schedule for resolution of the Order. It is important to ensure that remedies are credible to underscore the importance of meeting performance commitments.

II. A Proper Advanced Services Affiliate Should Be Embraced

NorthPoint continues to support the adoption of a separate affiliate as a structural remedy to prevent discrimination against DSL CLECs. Accordingly, NorthPoint welcomes BA-NY's proposal to institute immediately a separate affiliate for the provision of advanced services. Implementation of a proper separate affiliate will go a long way toward ensuring that the market for DSL services is truly competitive and advancing the goal of the Commission to supplant regulation with competition. Thus, NorthPoint commends BA-NY for its proposal and believes that this is additional evidence of Bell Atlantic's good faith effort to address advanced services issues generally.

With regard to BA-NY's proposal, NorthPoint is concerned that BA-NY's proposal to adopt portions of the SBC/Ameritech conditions regarding the advanced services affiliate requires clarification to ensure that the benefits of the affiliate and recent Commission decisions are not retraced.⁶

⁴ While NorthPoint will exploit access to shared lines, once available, to expand delivery of shared-line services to consumers, stand-alone SDSL services will remain a significant and important part of our product line and cannot be dismissed as transitional.

⁵ The New York Public Service Commission's Amended Performance Assurance Plan is still in development, and initial proposals by BA-NY to allocate approximately \$43,000 per month to the three DSL-related measures do not appear likely to be sufficient. *See* Department of Justice Comments at 37 (NY performance plan is no substitute for section 271 scrutiny).

⁶ The urgent problems with BA-NY's current performance relate to stand-alone loops and the loop qualification information that DSL competitive LECs require. Virtually all of BA- (cont'd)

In its letter of December 10, 1999, Bell Atlantic commits to establish a separate affiliate on *generally* the same conditions as those outlined in the SBC/Ameritech Order, App. C., paras. 1-14. However, BA-NY's separate affiliate proposal requires clarification. Further, in light of the Commission's intervening decisions in the UNE Remand Order, and the Line Sharing Order,⁷ adoption without advancement of last summer's SBC/AIT affiliate would set back progress recently made by the Commission toward advancing broadband competition. Accordingly, certain clarifications of and modifications to Bell Atlantic's commitments should be made in order to achieve the same results sought by the SBC/Ameritech order and to avoid imperiling progress in the UNE Remand and Line Sharing Orders.

First, BA-NY should clarify that the surrogate line sharing discount will remain in place until competitive LECs get nondiscriminatory access to shared lines, a correction to the statement in Mr. Tauke's letter of December 10 that surrogate Line Sharing discounts would terminate upon the date the affiliate is established, regardless whether BA-NY was offering line sharing to competitive LECs. (See Tauke December 10, 1999 letter at para. 13(a).)

Second, because at the time the SBC/Ameritech merger was adopted the Line Sharing Order was not adopted, it may have been appropriate then to avoid setting specific commitments to implement line sharing. But continued discrimination in favor of the affiliate is no longer appropriate in the wake of the Commission's Line Sharing Order, which requires incumbent LECs to make access to shared lines available within 180 days of the order's release, or no later than June 6, 2000. (See paras. 130-31, 160-64.) It appears that this is what BA-NY *intended* in its implementation, but without this clarification BA-NY will have no *obligation* to make available nondiscriminatory access to shared lines. BA-NY should commit to implement line sharing on a date certain.

NY's DSL services are currently provided over shared lines; all of NorthPoint's DSL services are currently provided over stand-alone loops. Therefore, establishing a Bell Atlantic separate affiliate for DSL service, in and of itself, may not obligate BA-NY to meaningful parity obligations with regard to provisioning. See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (released November 5, 1999) (UNE Remand Order) at para. 428.

⁷ In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Dockets No. 98-147 and 96-98, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98 (released December 9, 1999) (Line Sharing Order).

Third, BA-NY did not include critical audit provisions from the SBC/Ameritech merger conditions that are closely tied to the affiliate. See SBC/Ameritech conditions at paras. 67-68. These are essential to ensuring that the requirements of section 272 and the affiliate are actually followed.

Fourth, BA-NY's commitment should include provisions similar to those in paragraphs 18-20 of the SBC/AIT conditions in Appendix C, modified (as described below) to comply with the requirements of the UNE Remand Order. (These paragraphs are indirectly incorporated by virtue of paragraph 4(b)(5), but their application is sufficiently important that they should be expressly adopted.)

- BA-NY should provide CLECs using inadequate loop qualification systems the same discounts made available in the SBC/Ameritech conditions. Paragraph 18 of those conditions requires SBC/AIT to provide additional discounts from its charges for access to unbundled loops pending development and deployment of certain OSS systems. These discounts are intended as a partial compensation for the fact that existing systems are tailor made for the incumbent, but not adequate for competitive DSL LECs. Similarly, until BA-NY remedies the disparity in useful access by improving loop qualification data for DSL CLECs (as described below), BA-NY should be required to offer the same discounts.
- The modifications required of BA-NY are different from those identified specifically in the SBC/Ameritech conditions at paragraphs 19-20, which preceded the UNE Remand Order's clarification on OSS for advanced services. BA-NY's loop qualification data for DSL CLECs must comply with the requirements of the UNE Remand Order.⁸ This more basic loop make-up information is not "filtered" by BA-NY's retail offerings and is essential to giving DSL CLECs a meaningful opportunity to offer services other than those offered by the affiliate. Until BA-NY can provide that information to requesting DSL carriers, it should commit to offer the same discounts that SBC/AIT agreed to offer in paragraph 18.
- To effect these requirements of the UNE Remand with reference to the SBC/Ameritech conditions, paragraphs 19, 20(a), (b) and (c) must be modified by removing "retail" limitations. See UNE Remand at para. 430 ("We also clarify that under existing rules the relevant inquiry is not whether the retail arm of the incumbent has access to underlying loop qualification information, but rather whether such information exists anywhere in the incumbent's backoffice....") Those paragraphs must also be modified, particularly subparagraph (c), to ensure that BA-NY provides timely electronic access to the

⁸ UNE Remand Order at paras. 427-28.

basic loop makeup elements identified in paragraph 427 of the UNE Remand Order.

III. Performance Assurances and Meaningful Remedies

Clearly, if BA-NY continues to invest the effort, resources and focus to resolving DSL provisioning issues that it has demonstrated recently, it will achieve its committed targets of provisioning timely, working DSL capable loops. In this regard NorthPoint is enthusiastic about BA-NY's commitment to the NYPSC to provisioning timely at least 95% of the loops ordered by competitive LECs on the committed installation date, and to ascend to that target by achieving, at a minimum, 85%, 90% and 95% targets in the first, second, and third and following quarters of 2000, respectively.⁹

In the event that commitments do not translate to success, it is essential that measures be put in place that ensure continued focus and provide relief in the event that commitments fail. In this regard, proposals by BA-NY to rely solely on the Amended Performance Assurance Plan – a schedule of penalties tied to failed metrics – may not be a wholly sufficient substitute for the present scrutiny under section 271. Indeed, with regard to assurances that such a plan could substitute for vigorous (and continued) vigilance under section 271, it is important to note that “[t]he Department [of Justice] does not believe it would be wise to rely solely on these plans, rather than the more powerful incentives created by Section 271, to ensure rapid completion of necessary market opening measures.” (DOJ Comments at 37.)

Accordingly, it is critical that this Commission make it clear that it will hold BA-NY to meet or exceed the provisioning standards proffered in this letter as a bare minimum to sustain its inter-LATA authority pursuant to section 271(d)(6). Further, the Commission should establish now specific clear check points for further examination at 120 and 270 days after the effective date of this order to assess BA-NY's progress. Thus, in any order approving BA-NY's application, the Commission must make clear that if BA-NY fails to achieve its committed goals for loop provisioning, the Commission will issue an order directing BA-NY to show cause why it should not be required to suspend: (1) marketing and sales of long distance service to new customers, and (2) marketing and sales of DSL services to new customers.

The existence of a structure for continuing enforcement of the Commission's orders, with real penalties, will assist in providing incentives to BA-NY to meet 271 checklist requirements after its application has been approved, as required by the statute, and ensure that progress in opening markets is not retraced through neglect or inattentiveness to material commitments.

⁹ See note 1, above.

December 17, 1999

Should you have any questions about this submission, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Olsen". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael E. Olsen
Deputy General Counsel

cc: Commissioner Ness
Commissioner Furchtgott-Roth
Commissioner Powell
Commissioner Tristani
Dorothy Attwood
Jordan Goldstein
Helgi Walker
Kyle Dixon
Sarah Whitesell
Lawrence Strickling
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